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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCUS M. AUBRY,

Defendant and Appellant.

E046164

(Super.Ct.No. FVI700185)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata,  
Judge. Affirmed.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Gary W. Schons, Assistant Attorney General, and Natasha Cortina and  
Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Marcus M. Aubry was convicted of driving under the influence of alcohol and driving with a blood alcohol content of 0.08 percent or more (Veh. Code, § 23152, subds. (a) & (b)). In a bifurcated trial, the court found true the allegations that defendant had previously suffered a conviction for gross vehicular manslaughter while intoxicated (Pen. Code,<sup>1</sup> § 191.5, subd. (a)), within the meaning of Vehicle Code section 23550.5, subdivision (b), and three prior “strike” convictions (Pen. Code, §§ 667, subds. (b)–(i), 1170.12, subds. (a)–(d)). On June 20, 2008, the court sentenced defendant to serve two indeterminate terms of 25 years to life, and ordered that the second term be stayed pursuant to section 654. He appeals, contending: (1) the court abused its discretion in refusing to strike two of his prior strike convictions; (2) his sentence violates the constitutional prohibition against cruel and unusual punishment; (3) his sentence violates the constitutional prohibition against double jeopardy; and (4) he cannot be convicted of both driving under the influence and driving with a blood alcohol content of 0.08 percent or more.

## I. PROCEDURAL BACKGROUND AND FACTS

Approximately 3:15 in the afternoon on May 15, 2006, California Highway Patrol Officer James Polder stopped defendant for driving over 100 miles per hour northbound on Interstate 15 in the County of San Bernardino. Further investigation caused the officer to suspect that defendant was intoxicated. The officer requested that defendant step out of the vehicle for field sobriety tests. Based on the results of the field sobriety tests, the

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

officer administered a preliminary alcohol screening test, which captures deep lung air. Given the results of the tests, defendant was arrested for driving under the influence. A breath test administered at the jail indicated defendant's blood alcohol content was 0.12 percent.

## II. DECLINING TO STRIKE DEFENDANT'S PRIORS

Prior to sentencing, defendant requested that the court strike two of his prior strike convictions pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court denied the request, stating: "Now, I'm going to say this for the record. This is one of those cases where our system in my humble opinion . . . is woeful. And I'll say this: I don't think that this should be a life sentence. If I had the power not to make this a life sentence but make it something more than six years—because that's the alternative. If I strike two strikes, I would aggravate you and give you—and double that, so three times two is six versus 25 to life. There is just way too much time in between it. And I don't have a choice other than those two extremes. [¶] What I think that your sentence should be, and like I told [defense counsel], I'm saying for the record, if I had the power to, it would be somewhere in between and you would not have a life tail because I don't think that this case warrants it. On the other hand, I don't think that it warrants six years. I think it warrants significantly more time but not a life sentence. But for whatever good it does, having heard this case—I've been in this business for almost 30 years, and that has made this case very difficult because of its disparity. There should be something—there should be a middle ground that you should be able to be sentenced to and there isn't. And . . . I call on the [L]egislature and the reviewing court, perhaps, to

find a way to do that.” Defendant contends the trial court abused its discretion in refusing to strike any of his prior “strike” convictions, all of which arose from a single incident.

*A. Standard of Review.*

A trial court’s decision not to strike a prior qualifying conviction is subject to review under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375-376 (*Carmony I*.)

*B. Analysis.*

The “Three Strikes” law “was intended to restrict courts’ discretion in sentencing repeat offenders.” (*Romero, supra*, 13 Cal.4th at p. 528.) “To achieve this end, ‘the Three Strikes law does not offer a discretionary sentencing choice, as do other sentencing laws, but establishes a sentencing requirement to be applied in every case where the defendant has at least one qualifying strike . . . .’ [Citation.]” (*Carmony I, supra*, 33 Cal.4th at p. 377.) To find an exception to the Three Strikes law, the trial court must consider whether a defendant is “outside the scheme’s spirit” to the point where he should be treated as though he had not been convicted of the prior serious or violent felony. (*Carmony I, supra*, at p. 377.) The trial court looks at the nature and circumstances of defendant’s present and prior felonies, his background, character, and prospects, his constitutional rights, and the interests of society represented by the People. (*Ibid.*) There is a strong presumption that any sentence which conforms to the sentencing norm created by the Three Strikes law is both rational and proper, and the trial court must explicitly justify its decision to depart from this norm. (*Carmony I, supra*, at p. 378.) A

trial court abuses its discretion in failing to strike a prior felony conviction allegation in only limited circumstances, such as where the court considered impermissible factors in declining to dismiss, or the sentencing norms would result in a ““patently absurd”” result in the particular facts of the case. (*Ibid.*) “It is not enough to show that reasonable people might disagree whether to strike one or more of [defendant’s] prior convictions.” (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

Here, defendant claims his case is “extraordinary and falls outside the three strikes scheme” because: (1) his current offense is a wobbler; (2) his prior qualifying offenses were remote and arose from a single incident in 1991; (3) in the six years from his release from prison in 2000, he had had no felony convictions or convictions for driving under the influence; and (4) his prior offenses resulted from the fact that he is an alcoholic. Regarding the fact that all of his prior qualifying offenses arose from a single incident, defendant argues that, because they are so closely connected, arising from a single act and prosecuted in one case, the trial court abused its discretion in failing to strike all but one of the prior strikes. (*People v. Burgos* (2004) 117 Cal.App.4th 1209, 1216 (*Burgos*).) We disagree.

Defendant’s single incident involved driving his car into oncoming traffic and colliding head on with another car. Three passengers in the other car, two women and a three-year-old girl, were killed. A blood sample taken from defendant five and one-half hours after the collision showed his blood alcohol content to be 0.16 percent. Defendant pled guilty to three counts of gross vehicular manslaughter while intoxicated and was sentenced to serve 14 years in state prison.

Defendant's reliance on *Burgos* is unavailing. There, "[the defendant] and two companions approached a man at a gas station and [the defendant] demanded the victim's car while one of the companions told the victim that he had a gun. [The defendant] and his companions were frightened off before they took the victim's car." (*Burgos, supra*, 117 Cal.App.4th at p. 1212, fn. 3.) As a result, the defendant had two strike priors—a conviction for attempted robbery and a conviction for attempted carjacking. (*Ibid.*) The appellate court held that "the failure to strike one of the two priors [*sic*] convictions that arose from a single act constitutes an abuse of discretion." (*Id.* at p. 1214, fn. omitted.) It noted that in *People v. Benson* (1998) 18 Cal.4th 24, the Supreme Court held that a prior conviction on which the sentence had been stayed pursuant to section 654 nevertheless constituted a strike. In a footnote, *Benson* declined to decide "whether there are some circumstances in which two prior felony convictions are so closely connected—for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct—that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." [Citation.]" (*Burgos, supra*, at pp. 1214-1215, quoting *Benson, supra*, at p. 36, fn. 8.) The *Burgos* court felt this language "strongly indicates that where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors." (*Burgos, supra*, at p. 1215.)

The court, however, also noted: "In the case of these particular offenses, not only did the two prior convictions arise from the same act, but, unlike perhaps any other two

crimes, there exists an express statutory preclusion on sentencing for both offenses. [Penal Code] [s]ection 215, subdivision (c) permits the prosecution to charge a defendant with both carjacking and robbery under [Penal Code] section 211, but expressly states that ‘no defendant may be punished under this section and Section 211 for the same act which constitutes a violation of both this section and Section 211.’ While this provision does not refer to the use of the convictions as priors in a later prosecution such as the one before us, it reinforces our belief that infliction of punishment in this case based on both convictions constitutes an abuse of discretion.” (*Burgos, supra*, 117 Cal.App.4th at p. 1216.)

Likewise, the *Burgos* court did not base its conclusion that the trial court abused its discretion in failing to strike a prior strike conviction solely on the fact that the defendant’s two prior strike convictions were based on a single act. Rather, that court also observed the defendant’s current offenses were not serious and that his criminal history was not significant. (*Burgos, supra*, 117 Cal.App.4th at p. 1216.)

Here, unlike in *Burgos*, there was no statutory bar to sentencing defendant on all of his three priors. Ordinarily, when criminal convictions are based on the same act, dual sentencing is barred under section 654. However, under the “multiple victim” exception to section 654, “the limitations of section 654 do not apply to crimes of violence against multiple victims.’ [Citation.]” (*People v. Oates* (2004) 32 Cal.4th 1048, 1063, quoting *People v. King* (1993) 5 Cal.4th 59, 78.) It appears that in 1991 defendant drove his car head on into another car with three occupants. Under the multiple victim exception, defendant could have been properly punished separately on three counts of gross

vehicular manslaughter. It follows that, even under *Burgos*, it was not an abuse of discretion to treat each of these convictions as a strike. Obviously, the trial court agreed.

Separately and alternatively, unlike the court in *Burgos*, we do not read the footnote in *Benson* to mean that it necessarily would be an abuse of discretion to refuse to strike one of three priors arising out of a single act. Rather, we take the Supreme Court at its word, i.e., it simply was not deciding this issue one way or the other. Once we read not only *Benson*, but also *Carmony I* and *People v. Williams* (1998) 17 Cal.4th 148, pages 161 through 164, which deal specifically with the scope of the trial court's discretion to strike a strike, it becomes clear that the crucial question is whether the defendant falls outside the spirit of the Three Strikes law. While the nature and interrelationship of the strike priors are certainly factors to be considered, they cannot, by themselves, be dispositive. This may be why the *Burgos* court went on to note that other factors also weighed in favor of striking a strike.

According to the record before this court, defendant had a significant criminal history spanning more than 20 years. In addition to the three manslaughter convictions, he has been convicted of disturbing the peace at a school (§ 626.8), carrying a concealed firearm (§ 12025, subd. (a)), grossly negligent discharge of a firearm (§ 246.3) and domestic violence (§ 273.5). Defendant has abused alcohol his entire life. As the court said to defendant, “You didn’t learn from your mistakes. You didn’t learn from the time that you did in prison. You did so much time in prison, and you would think that after killing three people that you would never want to touch alcohol again; that that would be the furthest thing from your mind. [¶] One of the . . . things that came through with your

daughter's video was a lack of responsibility, a lack of accountability. She has it in her mind that somehow it's the system that's against you as opposed to you really messed up. And you haven't taken responsibility for your actions." The fact that defendant was driving 100 miles per hour while intoxicated demonstrates his refusal to conform to society's rules. Accordingly, it was not an abuse of discretion to conclude defendant was not outside the spirit of the Three Strikes law. As the trial court recognized, if it had granted defendant's motion, the maximum sentence would have been six years, which was too low. Thus, the trial court properly denied defendant's *Romero* motion.

### III. CRUEL AND UNUSUAL PUNISHMENT

Defendant was sentenced as a third strike offender to two separate sentences of 25 years to life in prison for driving under the influence and driving with a blood alcohol level of 0.08 percent or more. (Veh. Code, § 23152, subds. (a) & (b).) The sentence on the latter offense was stayed pursuant to section 654. The normal sentence range for both offenses, for a first-time offender, is "imprisonment in the county jail for not less than 96 hours, at least 48 hours of which shall be continuous, nor more than six months, and by a fine of not less than three hundred ninety dollars (\$390), nor more than one thousand dollars (\$1,000)." (Veh. Code, § 23536, subd. (a).) Defendant claims his sentence of 25 years to life in state prison amounts to cruel and unusual punishment under the state and federal constitutions. We disagree.

"Cruel and unusual punishment is prohibited by the Eighth Amendment of the United States Constitution and article I, section 17 of the California Constitution.

Punishment is cruel and unusual if it is so disproportionate to the crime committed that it

shocks the conscience and offends fundamental notions of human dignity.’ [Citation.]

“‘A tripartite test has been established to determine whether a penalty offends the prohibition against cruel . . . [or] unusual punishment. First, courts examine the nature of the offense and the offender, ‘with particular regard to the degree of danger both present to society.’ Second, a comparison is made of the challenged penalty with those imposed in the same jurisdiction for more serious crimes. Third, the challenged penalty is compared with those imposed for the same offense in other jurisdictions. [Citations.] In undertaking this three-part analysis, we consider the ‘totality of the circumstances’ surrounding the commission of the offense. [Citations.]” [Citation.]’ [Citations.]” (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 568-569 (*Sullivan*); *In re Lynch* (1972) 8 Cal.3d 410, 425-427 (*Lynch*).)

“‘Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment.’ [Citations.]” (*Sullivan, supra*, 151 Cal.App.4th at p. 569.)

First, we consider the nature of the offense and the offender. As to the offender, “‘the inquiry focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant’s individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.’ [Citation.]” (*Sullivan, supra*, 151 Cal.App.4th at p. 570.) Defendant was 38 years old at the time of the offense in the instant case. Defendant’s record began in 1986 with convictions for drug possession and weapons charges. In 1991 he was driving under the influence when he collided head on with another car, killing three persons, for which he

was sentenced to serve 14 years in prison. In 2004 he was charged with domestic violence, also including a weapons charge. Two years later, he was stopped while driving in excess of 100 miles per hour with a blood alcohol content of 0.12 percent. Nonetheless, defendant argues his current offense was neither violent nor serious, and “[b]ut for the prior 1991 offense, the current crime would most likely have been prosecuted as a misdemeanor offense.”

As noted above, defendant’s criminal history is extensive and continuing. His recurrent criminality indicates that he has failed to learn from his past experience of causing the death of three persons. Recidivism statutes look not at the triggering offense, but at the combination of offenses to determine the threat of the offender to society. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 80-81.) “In imposing a three strikes sentence, the State’s interest is not merely punishing the offense of conviction, or the ‘triggering’ offense: ‘It is in addition the interest . . . in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.’ [Citations.]” (*Ewing v. California* (2003) 538 U.S. 11, 29.) Regardless of whether defendant’s current crime involved violence, considering all of his offenses, we find that he qualifies as a violent offender for purposes of determining the application of the Three Strikes law.

Next, we compare the punishment received with the penalty for more serious crimes. Here, defendant compares his sentence to sentences imposed for more serious crimes committed by first and second time offenders. With regard to other three strike offenders, he asserts that imposing the same penalty for all three strike offenders “does

not allow for gradations in culpability between crimes and therefore may be disproportionate to the crime when, as here, the crime is minor and the penalty severe.” Again, as discussed above, defendant had a substantial criminal history that legitimized the degree of imprisonment imposed in the instant case. Defendant has not met his burden of proof on the second prong.

Finally, we conduct a *Lynch* comparison of the California punishment with punishment for the same crimes in other states. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1433 [Fourth Dist., Div. Two].) “[A] comparison of California’s punishment for recidivists with punishment for recidivists in other states shows that many of the statutory schemes provide for life imprisonment for repeat offenders, and several states provide for life imprisonment without possibility of parole.’ [Citation.] We conclude, as have other courts when presented with essentially the same issue in similar contexts, that defendant has failed to establish his sentence is disproportionate when compared to recidivist statutes in other jurisdictions. [Citations.]” (*Sullivan, supra*, 151 Cal.App.4th at p. 573.)

Defendant acknowledges that recidivist statutes have gained popularity nationally over the last several years, and only 10 states have not implemented some type of recidivist statute. However, defendant asserts that in other jurisdictions, the statutes take into consideration the nature of the defendant’s current offense and limit imposition of the harshest punishments to the most serious offenses. Essentially, defendant contends that California’s rigid imposition of a life sentence for three strike offenders is disproportionate to the punishment imposed in other jurisdictions.

Reviewing courts have recognized that California's Three Strikes law is “‘among the most extreme’ [recidivist statute] in the nation[;] [however,] that factor ‘does not compel the conclusion that it is unconstitutionally cruel or unusual.’ [Citation.] ‘California’s Three Strikes scheme is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders.’ [Citation.] After undertaking a methodical comparison of repeat or habitual offender punishment schemes in other states, the court in *People v. Martinez* [(1999) 71 Cal.App.4th 1502,] 1516, declared that California is not required ‘to march in lockstep with other states in fashioning a penal code. It does not require “conforming our Penal Code to the ‘majority rule’ or the least common denominator of penalties nationwide.” [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct.’” (*Sullivan, supra*, 151 Cal.App.4th at pp. 572-573 (fn. omitted).)

In sum, defendant’s argument is not persuasive because other states have similar penalties, and the fact that California’s may be more extreme does not make it disproportionate or unconstitutionally cruel or usual. Defendant has not met his burden of proof on this prong either.

As to defendant’s argument that his sentence is cruel and unusual punishment under the Eighth Amendment of the federal Constitution, he simply utilizes the *Lynch* factors in support of his claim. However, as stated in *Ewing v. California, supra*, 538 U.S. 11: “When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth

Amendment prohibits California from making that choice. To the contrary, our cases establish that ‘States have a valid interest in deterring and segregating habitual criminals.’ [Citations.] Recidivism has long been recognized as a legitimate basis for increased punishment.” (*Id.* at p. 25.)

In view of the foregoing, we conclude that defendant’s life sentence does not constitute cruel and unusual punishment under either the state or federal Constitution.

#### IV. DEFENDANT’S SENTENCE AND THE DOUBLE JEOPARDY CLAUSE

Defendant contends his sentence violates the double jeopardy clause because his past offenses were used to elevate his present offense from a misdemeanor to a felony and also to enhance his sentence under the Three Strikes law. We disagree.

Both the state and federal Constitutions prohibit the state from placing a defendant twice in jeopardy for the same offense. (U.S. Const., 5th Amend., Cal. Const., art. I, § 15; *People v. Fields* (1996) 13 Cal.4th 289, 297-298.) “[The Fifth Amendment guarantee against double jeopardy] consists of three separate constitutional protections. It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense.” (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1519-1520.) The double jeopardy clause does not prohibit the imposition of enhanced punishment under a recidivist statute. (*Witte v. United States* (1995) 515 U.S. 389, 400; *White Eagle, supra*, at p. 1520.) “Recidivist statutes do not impose a second punishment for the first offense in violation of the double jeopardy clause of the United States Constitution. [Citation.] Moreover, the double jeopardy

clause does not prohibit the imposition of multiple punishment for the same offense where the legislature has authorized multiple punishment. [Citation.]” (*White Eagle*, *supra*, at p. 1520.)

Defendant argues that his life sentences constitute punishment for his past conduct rather than his present crimes. Specifically, he notes the prosecutor acknowledged that, but for defendant’s past, “we wouldn’t be sitting here. He would be home with his parents and family because his two days would be well over and done.” In support of his double jeopardy objection, defendant cites *People v. Carmony* (2005) 127 Cal.App.4th 1066 (*Carmony II*), in which the court stated: “Past offenses do not themselves justify imposition of an enhanced sentence for the current offense. [Citation.] The double jeopardy clause prohibits successive punishment for the same offense. [Citations.] The policy of the clause therefore circumscribes the relevance of recidivism. [Citations.] To the extent the ‘punishment greatly exceeds that warranted by the aggravated offense, it begins to look very much as if the offender is actually being punished again for his prior offenses.’ [Citation.]” (*Id.* at p. 1080.) Nevertheless, while the court loosely peppered its analyses with double jeopardy terminology, it decided its case on the grounds of cruel and unusual punishment. (*Id.* at p. 1089.) “[I]t is axiomatic that cases are not authority for propositions not considered. [Citations.]” [Citation.]” (*Gomez v. Superior Court* (2005) 35 Cal.4th 1125, 1153.) Thus, the case does not stand as authority for the proposition that a three strikes sentence may be violative of double jeopardy proscriptions. Moreover, the case recognized that recidivists could be punished more

severely than first time offenders without violating the prohibition against double jeopardy. (*Carmony II, supra*, at p. 1079.)

Here, defendant was convicted of driving under the influence at a speed in excess of 100 miles per hour after sustaining previous convictions for drug possession, weapons charges, domestic violence, and driving under the influence and causing the death of three people. Thus, defendant continues to show a strong disregard for others, making enhancement of his sentence under the recidivist Three Strikes law particularly appropriate. The imposition of defendant's current sentence, pursuant to the Three Strikes law, does not violate double jeopardy proscriptions.

#### IV. LESSER INCLUDED OFFENSE

Defendant contends he cannot be convicted of violating both subdivisions (a) and (b) of Vehicle Code section 23152 as a result of only his single act of drunk driving. We disagree.

The crime of driving with a blood alcohol level of 0.08 percent or higher (Veh. Code, § 23152, subd. (b)) is separate and distinct from the crime of driving under the influence (Veh. Code, § 23152, subd. (a)). (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 264-265; *People v. Subramani* (1985) 173 Cal.App.3d 1106, 1111.) The fact that the jury was instructed of the rebuttable presumption that applies when a person's blood alcohol content is 0.08 percent or greater (Veh. Code, § 23610, subd. (a)(3)) is

irrelevant.<sup>2</sup> As the People correctly point out, the instruction merely informed the jury of a permissive presumption, which did not change the fact that the crimes are distinct. Vehicle Code section 23152, subdivision (b), driving under the influence, requires a showing of driving impairment but does not required a showing of any particular blood alcohol level. Vehicle Code section 23152, subdivision (a), driving with 0.08 percent blood alcohol content, requires a showing of 0.08 percent or more alcohol level but not a showing of driving impairment.

The defendant was properly convicted of both offenses.

#### V. DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.

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<sup>2</sup> “If the People have proved beyond a reasonable doubt that the defendant’s blood alcohol level was 0.08 percent or more at the time of the chemical analysis, you may, but are not required to, conclude that the defendant was under the influence of an alcoholic beverage at the time of the alleged offense.” (CALCRIM 2110.)